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ABSTRACT

To consider one aspect of workplace freedom of speech--the question of authority versus freedom, this paper examines the first amendment protections of government workers. The paper looks at freedom of speech rights by using two theoretical frameworks (the natural rights view and the law and economics view) to analyze Supreme Court decisions on balancing free speech and government efficiency. These frameworks are also used to interpret Supreme Court decisions on distinguishing matters of public concern from matters of personal concern and defining topics of public concern. The paper concludes that, after nearly 20 years, judicial decisions in the Consitutional rights of public employees are starting to settle into a recognizable pattern and that there are two sides to be weighed when evaluating workplace freedom of speech. The paper identifies one side as the commenting side, where speech is considered protected if it addresses a matter of public concern. The other side is identified as the organizational efficiency side, in which various factors are weighted against freedom of speech, including: the time, place, and manner; the context in which the dispute arose; whether the statement impairs discipline by supervisors or harmony among coworkers; whether the statement has a detrimental impact on close working relationships in which personal loyalty and confidence are necessary; whether it impedes the performance of the speaker's duties; or whether it interferes with the regular operation of the enterprise. (MS)

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FREEDOM OF EXPRESSION AND GOVERNMENT EMPLOYEES: A TRADITIONAL POINT OF VIEW

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I. INTRODUCTION

During the last twenty years there has been an expanding concern over the rights of employees. In the private sector, the once insuperable employer dismissal power arising from the venerable "at-will" doctrine is being chipped away by statutes; and common law developments in tort of wrongful discharge and breach of contract actions. In the government sector, civil service reform measures such as the federal government's United States Merit Systems Protection Board and emerging constitutional protections have created new rights for government workers.

These reforms eventually force policy makers to confront the issue of freedom of speech in the workplace. Although, it has traditionally been viewed much more narrowly than freedom of speech in society at large and usually concentrates on whistle-blowing or participating in government investigations, nowhere does the age old question of authority versus freedom stand out as sharply as in the workplace.

In this paper, one aspect of workplace freedom of speech will be examined -- the first amendment protections of government workers. The Supreme Court's struggle over its twin concern for government efficiency and freedom of speech illustrates the historical difficulties that all

policy makers face when trying to reconcile freedom with order.

It does not take much imagination to see an analogy between the government workplace and society. In society at large, we cherish freedom of speech as a political ideal yet we grow nervous when speech stirs up heated controversy. Similarly, in the government workplace we welcome the insights of free speaking employees yet we grow fearful when such speech appears to threaten government efficiency.

Does freedom of speech weaken the ability to govern society or manage a government organization? The closeness of the workplace gives us little room to avoid confronting the question and thus our rationale for freedom of speech. Thus, it is an excellent philosophical laboratory.

The Supreme Court has been contemplating the nature of First Amendment free speech protections for government employees for 19 years. Yet the court is far from reaching consensus -- the last two cases were decided by 5-4 votes. The court now uses a two step test. First, speech must be on a matter of public concern in order to merit protection. If that threshold is passed, the speech is then put into a balancing test. On one side is the interest in freedom of speech. On the other side is the government's interest in discipline; co-worker harmony; personal loyalty and confidence; performance of duty; and public confidence in the

agency. The factors are weighed on a case by case basis.

In the workplace or society at large there are many theoretical frameworks which are useful in analyzing freedom of speech rights. Two such frameworks (the natural rights view; and the law and economics view) are examined in this Southern Speech Communication Association panel. However, while ascending such lofty theoretical perspectives we should not lose sight of the stakeholders in the process.

In these cases there are three stakeholders. First, the public has an interest in hearing the voices of public employees -- often the people who have informed and definite opinions on the inner workings of government. Since the public relies on government services, pays for the government, and is ultimately responsible for the actions of the government; the voices of public employees in political debate helps the public and its elected representatives in their civic responsibility of overseeing government.

Second, government organizations have an interest in maintaining efficient and effective operations. To the extent that speech threatens efficiency and effectiveness, it threatens vital government services. Government has an interest in being able to manage its operations.

Finally, the individual employee has an interest in being able to speak out without fear of retaliatory dismissal. Seeing employees get fired for what they say

obviously has a chilling effect on expression. Constraints on expression denies employees basic dignity and their full potential as human beings. More pragmatically, dismissal often brings on financial hardships, humiliation, and psychological scars. Scholars may treat dismissal in the abstract but it is concrete and immediate to a government worker who suddenly is striped of accrued benefits and a livelihood.

II. BALANCING FREE SPEECH AND GOVERNMENT EFFICIENCY: FROM PICKERING TO CONNICK

The Constitutional concern over the free speech of public employees can be traced back to the landmark 1968 Supreme Court decision in Pickering v. Bd. of Education.[1] In the case, school teacher Marvin Pickering sought reinstatement after being dismissed for publishing a letter critical of a school board backed bond issue and the allocation of existing financial resources. Justice Marshall, writing for the Court, ruled that a balance must be struck between the interest of the public employee in ". . . of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[2] Marshall further ruled that the balance should be applied on a case by case basis. Marshall ruled in favor of Pickering.

The Commenting Side

The creation of the Pickering balance, or Pickering calculus as it is sometimes known, left the courts scrambling to define the phrase "commenting on matters of public concern." Several Circuit Courts ruled that communication concerning such matters as a school district's financial ability to raise salaries[3] and a promotion decision in a fire department[4] were matters of public concern. On the other hand, some Circuit Courts ruled that communication concerning such matters as a new fireman's union,[5] selecting a university department chair,[6] and racial discrimination in the employment practices of a school district[7] were not matters of public concern.

The Supreme Court made an initial attempt at defining matters of public concern in the 1979 case Givhan v. Western Line Consolidated School District.[8] The Court looked at the issue in terms of communication aimed outside the organization and communication aimed only within the organization. Justice Rehnquist, writing for the Court, held that: "Neither the First Amendment itself or our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public."[9]

Although the Givhan decision clarified the external/internal communication question, it did not define

the phrase "commenting upon matters of public concern." The federal circuit courts were still defining the phrase differently after Givhan and would have to wait until the Connick and later Rankin decision to receive guidance.[10]

The Organizational Efficiency Side

On the other side of the balance (the interest of the State, as an employer, in protecting the efficiency of the public services it performs through its employees) the lower courts were also left without much guidance. In the text and footnote 3 of the Pickering decision, Justice Marshall did suggest that in some situations factors such as discipline; co-worker harmony; confidentiality; and personal loyalty and confidence might be considered in a balance.[11] However, he made it clear that cases should be decided on a case by case basis and that: "We intimate no view as to how we would resolve any specific instances of such situations . . . ."[12]

Even though Marshall admonished the courts to use the Pickering balance on a case by case basis, it should not be surprising that many circuits clung to Marshall's categories as a framework for using the balance.

In addition, the Supreme Court and the lower courts later added, in effect, other factors which might weigh against speech. In the 1979 Givhan decision, Justice Rehnquist suggested that time, place, and manner

considerations might be placed in the balance.[13] In addition, several circuits have held that damage to the good name of the organization should be placed in the balance. These cases have involved such factors as the misuse of school board letterhead,[14] avowed homosexuality,[15] and spreading wild rumors.[16]

In order to weigh the elements in the Pickering balance, the courts have had to decide who should shoulder the burden of proof and what standards of proof should apply. In these cases the courts have held that the employee must first establish that he or she was dismissed or otherwise harmed by the employer in retaliation for protected communication. The burden then shifts to the employer to prove either that the same action would have been taken even without protected speech,[17] or that the communication harmed or threatened to harm organizational efficiency. The standard of proof for harm to organizational efficiency has caused the most controversy between the circuits, and in Connick and Rankin, between the justices of the Supreme Court.

Prior to Connick, most circuits held to a standard of proof that generally required a showing of actual harm. The Second,[18] Fourth,[19] and Fifth Circuits[20] required that it be shown that the communication would "materially and substantially" interfere with the efficiency of the organization. They borrowed the concept from the Supreme

Court's decision in the student armband case of Tinker v. Des Moines Independent Community School District.[21] The D.C. Circuit used a specific finding of adverse effect standard,[22] the Sixth Circuit used a meaningful interference standard,[23] and the Tenth Circuit used a real and important standard.[24] Although the actual wordings of the tests were different, it is clear that these courts were looking for a definite causal relationship between communication and harm to efficiency.

However, the Eighth Circuit did not require that actual harm be shown but only a potential for harm. In Birdwell v. Hazelwood School District, Judge Smith, writing for the court, ruled that: "In a situation of potential disruption, there is no requirement in the law that the proper authorities must wait for the blow to fall before taking remedial measures."[25] Here again the courts had to wait for the Connick decision.

III. CROSSING THE THRESHOLD OF PUBLIC TOPICS: FROM CONNICK TO RANKIN

In 1983 the Supreme Court handed down another landmark decision. In Connick v. Myers, the Court addressed issues on both sides of the Pickering balance. The diverse viewpoints on the Court concerning freedom of speech is reflected in the narrow 5-4 vote and the heated dissent by Justice Brennan,

joined by Justices Marshall, Blackmun, and Stevens.

The case arose when an assistant New Orleans district attorney, Shelia Myers, was transferred to prosecute cases in a different section of the criminal court. Myers, who strongly opposed the transfer, complained to several supervisors and later distributed a questionnaire, usually during her lunch hour, to other Assistant District Attorneys. The questionnaire contained questions about office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns. Myers was then fired for refusal to accept the transfer and for distributing the questionnaire which Harry Connick, the district attorney, considered an act of insubordination.

Doubly embarrassing was her repeated misuse in the questionnaire of the words "affect" and "effect." A fact which was noted in an appendix to the Supreme Court's opinion for all of her colleagues to see.

Justice White was chosen to write the decision of the Court. His decision and Brennan's dissent are best analyzed by examining the interests on each side of the Pickering balance separately.

The Commenting Side

In Connick, Justice White finally attempted to define

the phrase "matters of public concern." Although Justice White found that Myers' questionnaire was not ". . . wholly without First Amendment Protection,"[26] he found it was not, save for one question about pressure to serve on political campaigns, about a matter of public concern. To Justice White, if there is no matter of public concern, there is no need to even use the Pickering balance. According to Justice White:

> Pickering, its antecedents and progeny, lead us to conclude that if Myers' questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge. When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices without intrusive oversight by the judiciary in the name of the First Amendment. . . . [W]hen a public employee speaks, not as a citizen upon matters of public concern, but instead as an employee upon matters of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.[27]

Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, offered a vigorous dissent. He argued that the concept of "commenting on matters of public concern" should not be narrowly defined by the courts and that the Pickering balance affords adequate attention to the inefficiency side as a mechanism to protect the public services. Brennan argued:

> [I]n concluding that the effect of respondent's personnel policies on employee morale and the work

> performance of the District Attorney's Office is not a matter of public concern, the Court impermissably narrows the class of subjects on which public employees may speak out without fear of retaliatory dismissal. . . . [B]ased on its own narrow conception of which matters are of public concern, the Court implicitly determines that information concerning employee morale at an important government office will not inform public debate. To the contrary, the First Amendment protects the dissemination of such information so that the people, not the courts, may evaluate its usefulness.[28]

Thus, the Court, or at least a slim majority of the Court, held that matters of public concern must be distinguished from matters of personal concern. However, the only guidance that the Court gave is that: "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record."[29] White distinguished the behavior of Bessie Givhan in Givhan v. Western Line Consolidated School District by finding that, "it is clear that Givhan's statements concerning school district's allegedly racially discriminatory policies involved a matter of public concern."[30] Justice Brennan, in his dissenting opinion, attacked White's reasoning:

> The Court seeks to distinguish Givhan on the grounds that speech protesting racial discrimination is "inherently of public concern". . . . In so doing, it suggests that there are two classes of speech of public concern: statements "of public import" because of their content, form and context, and statements that, by virtue of their subject matter, are "inherently not of public concern." In my view, however, whether a particular statement by a public employee is addressed to a subject of public concern does not depend on where it was said or why. The First Amendment affords special protection to speech that may inform public debate about

> how our society is to be governed--regardless of whether it actually becomes the subject of a public controversy.[31]

The Connick threshold is, in effect, a device to screen out largely personnel issues from matters of public concern. Of course, as Brennan warned in his dissent, it is often difficult to distinguish personnel practices from matters which concern the public.

The circuits dutifully applied the Connick threshold test before weighing speech in the Pickering balance. It is interesting to note that in the review of cases many judges were incredulous about the heavy-handed, and sometimes corrupt, personnel practices in government agencies but refused to intervene.

The Fourth Circuit decided that a leak of an internal investigation by a policeman,[32] and a magistrate's complaints about doing photocopying[33] were not matters of public concern. The Fifth Circuit found that a doctor's complaints about patient care and the reassignment of his parking space did not cross the threshold.[34] The Sixth Circuit ruled that a high school guidance counselor's disclosure of her homosexuality to coworkers did not meet the Connick test.[35] The Seventh Circuit found that the urging by a police officer to another officer to appeal a suspension[36] and a brief phone conversation between two employees concerning the impending removal of an agency head[37] did not cross the threshold. The

Tenth Circuit decided that complaints to the Inspector General of the Air Force concerning unfair treatment,[38] and the wearing of black badge shrouds by police officers mourning the death of a fellow officer[39] were not matters of public concern. Finally, the Eleventh Circuit ruled that complaints about probationary employment practices did not cross the Connick threshold.[40]

The Organizational Efficiency Side

In Connick, Justice White found that question eleven on Myers' questionnaire, which concerned pressure to work in political campaigns, was protected speech and therefore triggered the Pickering balance. This gave the Court an opportunity to examine the standards of proof necessary to establish harm or a threat of harm to organizational efficiency. Justice White seemed to reject the district court's use of a "substantial interference" standard and held that potential inefficiency could be determined by administrators and that their judgement of the danger of potential interference should carry great weight. Justice White ruled:

> When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgement is appropriate. Furthermore, we do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action. We caution that a stronger showing may be necessary if the

employee's speech more substantially involves matters of public concern.[41]

Justice Brennan again took issue with the majority opinion in his dissent. Justice Brennan first argued that the courts and not the employer should make the final appraisal of harm to organizational efficiency. Justice Brennan than went on to examine the Supreme Court's earlier decision in a student armband case. According to Justice Brennan:

> Such extreme deference to the employer's judgment is not appropriate when public employees voice critical views concerning the operations of the agency for which they work. Although an employer's determination that an employee's statements have undermined essential working relationships must be carefully weighed in the Pickering balance, we must bear in mind that "the threat of dismissal from public employment is . . . a potent means of inhibiting speech . . . . If the employer's judgement is to be controlling, public employees will not speak out when what they have to say is critical of their supervisors. In order to protect public employees' First Amendment right to voice critical views on issues of public importance, the courts must make their own appraisal of the effects of the speech in question.
>
> . . . . . .
>
> In Tinker we found that "in our system, undifferentiated fear or apprehension of a disturbance is not enough to overcome the right to freedom of expression . . . ." Because the speech at issue addressed matters of public importance, a similar standard should apply here.[42]

After Connick, the circuit courts seemed preoccupied with the new threshold test. However, once they decided that cases cleared the Connick threshold, they still had to apply the Pickering calculus. The Connick decision did not clarify whether actual or just potential harm to efficiency is

required to outweigh freedom of speech. The circuits were left to apply the Pickering balance on a case by case basis.

In most cases the courts, once the threshold was passed, ruled that freedom of speech outweighed any harm or potential harm to organizational efficiency. For example, the Fifth Circuit held that teachers' complaints in front of a school board about the discrimination they suffered for their support of a right to read program outweighed harm to efficiency.[43] The Seventh Circuit found that the freedom of speech outweighed any incidental disruption when police talked to attorneys, judges, and the FBI about being ordered not to issue tickets.[44] It also found that organizational efficiency did not outweigh the rights of a teacher/coach who complained to the school board about athletic travel policies.[45] The Eighth Circuit ruled in favor of a police officer who broke the police chain of command in order to report test cheating to other law enforcement authorities.[46] Finally, the Ninth Circuit also held that a teachers letter concerning athletic policies outweighed any harm to efficiency.[47]

In some circuits, organizational efficiency was seen to outweigh freedom of speech. For example, the Federal Circuit found that an FAA supervisor's comments on ABC's Nightline during an illegal strike by PATCO controllers did not outweigh the potential harm to the FAA during a national

emergency. The court specifically rejected the argument that the agency must 'clearly demonstrate' that the communication 'substantially and materially' interfered with the FAA.[48] The Eleventh Circuit found that insubordination outweighed freedom of speech when a police officer refused, on orders, to drop charges against the daughter of a corrupt local judge.[49]

IV. DEFINING TOPICS OF PUBLIC CONCERN

RANKIN AND BEYOND

The most recent Supreme court decision concerning the freedom of speech of public employees was Rankin v. McPherson.[50] Prior to Rankin the Supreme Court examined situations where the interests of all stakeholders were important. However, in Rankin the speech act was of little, if any, benefit to the public. Thus the value of freedom of speech per se was examined. The Supreme Court had an earlier chance to examine the issue but denied a petition for a writ of certiorari in Rowland v. Mad River School District.[51] Rowland involved a high school guidance counselor who made an off hand comment to a co-worker that she was a bi-sexual and soon found herself embroiled in controversy. Justice Brennan, joined by Justice Marshall, wanted to hear the case and dissented. According to Justice Brennan:

> This case . . . involves no critical statements, but rather an entirely harmless mention of a fact about petitioner that apparently triggered certain prejudices held by her supervisors . . . . This case poses the open question whether nondisruptive speech ever can constitutionally serve as the basis for termination under the First Amendment.[52]

Two years later, the Court decided to hear Rankin.

Rankin v. McPherson involved a 19 year old data entry clerk working in the Harris County, Texas constable's office. After hearing on the radio that an attempt had been made to kill President Reagan, she discussed Reagan's policies with a co-worker (who was also her boyfriend) and then said 'shoot, if they go after him again, I hope they get him!'[53] Her comment was overheard and reported by another co-worker not known to be in the room. McPherson was fired.

The Commenting Side

Nearly twenty years after Pickering, Justice Marshall again delivered the opinion of the Court in Rankin. He was joined by Justices Brennan, Blackmun, Powell, and Stevens. Justice Marshall first decided that the communicative act cleared the Connick threshold by finding that it "plainly dealt with a matter of public concern [because it] . . . was made in the course of a conversation addressing the policies of the President's administration."[54] Although he felt that a direct threat to kill the President would not be protected, the remarks of McPherson were not intended as a direct

threat.

Two things which Marshall did not explicitly say but implied should be noted. First, the remarks of McPherson were protected even though they were not of the whistle-blower variety -- indeed they had nothing to do with the operation of the Harris County Constable's Office. Second, McPherson's comments were not made to the public at large but were communicated privately. Justice Powell, in a concurring opinion addressed this issue directly:

> McPherson made an ill-considered -- but protected -- comment during a private conversation, and the constable made an instinctive, but intemperate, employment decision on the basis of this speech. I agree that on these facts, McPherson's private speech is protected by the First Amendment.[55]

Justice Scalia, in a dissenting opinion, thought that there was little value to the speech and therefore did not think that it crossed the Connick threshold as a matter of public concern. He was joined in his dissent by Chief Justice Rehnquist; and Justices White and O'Connor. Justice Scalia found that McPherson's comment did not compare to the other matters of public concern reviewed by the Court. He said:

> McPherson's statement is indeed so different from those that it is only one step removed from statements that we have previously held entitled to no First Amendment protection even in the nonemployment context--including assassination threats against the President (which are illegal under 18 U.S.C. sec. 871), see Frohwerk v. United States, 249 U.S. 204, 206, 39 S. Ct. 249, 250-51, 63 L.Ed. 561 (1919); "'fighting' words," Chaplinsky

> v. New Hampshire, 315 U.S. 568, 572, 62 S. Ct. 766, 769, 86 L.Ed. 1013 (1942); epithets or personal abuse, Cantwell v. Connecticut 310 U.S. 296, 309-310, 60 S. Ct. 900, 905-906, 84 L.Ed. 1213 (1940); and advocacy of force or violence, Harisiades v. Shaughnessy, 342 U.S. 580, 591-592, 72 S. Ct. 512, 519-520, 96 L.Ed. 586 (1952). A statement lying so near the category of completely unprotected speech cannot fairly be viewed as lying within the "heart" of the First Amendment's protection; it lies within that category of speech that can neither be characterized as speech on matters of public concern nor properly subject to criminal penalties, see Connick, at 147. Once McPherson stopped explicitly criticizing the President's policies and expressed a desire that he be assassinated, she crossed the line. [56]

Justice Scalia's dissent helped clarify the majority opinion. The majority saw freedom of speech on matters of public concern as protected no matter how much or how little value its content has. In other words, once the Connick threshold is passed, the value of the content is not weighed against damage to organizational efficiency. Freedom of speech on matters of public concern per se is what is weighed in the Pickering calculus. The quality of the content of the speech is not relevant.

So far there has been time for only a few circuit court decisions. However, in these decisions, Rankin has had an impact. The Seventh Circuit faced a case where a local civil service commissioner was fired after writing a letter to a local newspaper which could be construed as expressing hostility to Hispanics. Judge Richard Posner, writing for the court in Jungel v. Pierce, held that:

The letter published in the Beacon News was a statement

> of opinion on a matter of public concern, and thus was prima facie [sic.] protected by the First Amendment. That it could be read as expressing a point of view that nowadays is not only unfashionable but offensive did not impair its protected status; a principle dramatically reaffirmed by the Supreme Court in Rankin v. McPherson, ____ U.S. ____ , 107 S. Ct. 2891, 97 L.Ed. 2d 315 (1987).[57]

In Southside Public Schools v. Hill, the Eighth Circuit faced a situation were teachers were not renewed or were forced to resign in retaliation for writing a letter to the Arkansas Department of Education complaining of delay in implementing programs for handicapped students. Judge Dumbauld, sitting by designation, delivered the opinion of the court. Judge Dumbauld saw Marshall's opinion in stark contrast to Justice Scalia's dissent. He said: "That the case at bar is a much clearer case of public concern than McPherson is shown by the fact that, as pointed out by Justice Scalia's dissent, McPherson's statement was only one step removed from statements that we have previously held entitled to no First Amendment protection . . . ."[58] In other words, Judge Dumbauld's interpretation of Rankin is that all speech of public concern not outlined in Justice Scalia's dissent as unprotected in society at large (e.g. threats of violence; fighting words; epithets or personal abuse; or advocacy of force or violence), is protected by the First Amendment.

The Organizational Efficiency Side

In Rankin, once Justice Marshall decided that, "[t]he inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern," [59] he then placed the protected speech into the Pickering balance. He first reviewed the previous decisions of the Court and said that such factors as the manner, time, and place of the expression; the content in which the dispute arose; whether the statement impairs discipline by supervisors or harmony among coworkers; whether the statement has a detrimental impact on close working relationships in which personal loyalty and confidence are necessary; whether it impedes the performance of the speakers duties; or whether it interferes with the regular operation of the enterprise; should be weighed against freedom of speech.[60]

Justice Marshall then examined the facts in the case and concluded that the State failed to "justify the discharge on legitimate grounds." [61]According to Justice Marshall:

> While McPherson's statement was made at the workplace, there is no evidence that it interfered with the efficient functioning of the office. The Constable was evidently not afraid that McPherson had disturbed or interrupted other employees--he did not inquire to whom respondent had made the remark and testified that he "was not concerned who she had made it to," Tr. 42. In fact, Constable Rankin testified that the possibility of interference with the functions of the Constable's office had not been a consideration in his discharge of respondent and that he did not even inquire whether the remark had disrupted the work of the office. Nor was

> there any danger that McPherson had discredited the office by making her statement in public.[62]

Justice Marshall then attacked the argument that McPherson, as an employee of a constable's office, undermined the mission of the office. He said:

> The burden of caution employees bear with respect to the words they speak will vary with the extent of authority and public accountability the employee's role entails. Where, as here, an employee serves no confidential, policymaking, or public contact role, the danger to the agency's successful function from that employee's speech is minimal.[63]

Justice Powell, concurring, used even stronger language than Justice Marshall in minimizing the danger to public employment. It seems likely that Justice Powell was reacting strongly to Justice Scalia's dissent expressed either in conference or when draft opinions were circulated among the justices. Justice Powell wrote:

> [I]t will be an unusual case where the employer's legitimate interests will be so great as to justify punishing an employee for this type of private speech that routinely takes place at all levels of the workplace. The risk that a single, offhand comment directed to only one other worker will lower morale, disrupt the workforce, or otherwise undermine the mission of the office borders on the fanciful.[64]

In a footnote, Justice Powell clarified that although he believes that a public employer needs to be able to maintain efficiency, there was no "objective evidence that McPherson's lone comment had any effect on the morale or efficiency of the Constable's Office."[65] Thus, both the opinion of the Court and Justice Powell's concurring opinion seem to suggest

that actual proof of harm to organizational efficiency is needed in order to outweigh freedom of speech. However, strong fears of potential harm were not held by the Constable and, therefore, the Court did not have to decide whether strong fears of potential inefficiency or proof of actual inefficiency is needed in order to outweigh freedom of speech in the Pickering balance.

Justice Scalia, in his dissenting opinion, attacked the majority's reasoning. First, he found that a law enforcement official has a legitimate interest in preventing speech in her or his agency which advocates violent crime, "regardless of whether the statements actually interfere with office operations at the time they are made or demonstrate character traits that make the speaker unsuitable for law enforcement work."[66] Second, he suggested that the discomfort of Captain Levrier, who reported the remark, and the concerns of Constable Rankin were evidence of potential or actual harm to efficiency.[67] Finally, Justice Scalia argued that non-policy making employees "can hurt working relationships and undermine public confidence in an organization every bit as much as policy making employees."[68]

The Court in Rankin seemed to suggest that there must be some evidence of actual harm before the interests of organizational efficiency outweigh freedom of speech. However, because of the particular facts of the case the

Court did not have to be and was not clear on the matter.

In the only subsequent circuit court decision to use the Pickering balance, Judge Posner of the Seventh Circuit demanded evidence of disruption before he would allow organizational efficiency to outweigh freedom of speech. In Jungels, where a civil service commissioner wrote a letter offensive to Hispanics, Judge Posner found the speculation of city officials unpersuasive. According to Judge Posner:

> All this is speculation, and not all of it is plausible speculation. No evidence was presented concerning public perceptions and their impact, if any, on Jungels' ability to perform his duties as a civil service commissioner. No evidence was presented concerning "major disruption to municipal employment operations." No "substantial showing" -- no showing of any sort -- of disruption of the Civil Service Commission's operations was made.[69]

There will need to be further circuit court decisions and even subsequent Supreme Court decisions before the full meaning of Rankin is clear.

V. CONCLUSIONS

After nearly twenty years, the Constitutional rights public employees are starting to settle into a recognizable pattern. An employee who asserts freedom of speech rights must first show that she or he was dismissed, or otherwise retaliated against, for speaking about a matter of public concern. Once that threshold is passed, an employer may

either show that the employee would have been dismissed anyway for other reasons or that damage to organizational efficiency outweighs freedom of speech.

On the commenting side, speech is considered protected if it addresses a matter of public concern. It doesn't matter whether it is expressed outside of the organization or privately within the organization. It also does not seem to matter whether the content of speech is highly significant or vacuous. Freedom of speech per se has value.

On the organizational efficiency side, factors such as time, place, and manner; the context in which the dispute arose; whether the statement impairs discipline by supervisors or harmony among coworkers; whether the statement has a detrimental impact on close working relationships in which personal loyalty and confidence are necessary; whether it impedes the performance of the speaker's duties; or whether it interferes with the regular operation of the enterprise; are weighed against freedom of speech. The courts are not clear whether actual proof of harm to efficiency is needed. However, in Rankin, the Court seemed to imply that proof of actual, or at minimum likely, damage to organizational efficiency is needed.

The Supreme Court is moving slowly and cautiously on employee freedom of speech. Since the last two decisions were by 5-4 votes, it is clear that there is no clear

consensus. Future cases will most likely address the issue of the proof required for establishing damage to organizational efficiency.

Finally, the limits of constitutionalism should not be forgotten. Because of the wording of the First and Fourteenth Amendments, only government organizations are covered. Findings of "state action" are so rare that the private sector is usually not covered by the Constitution. In addition, since the federal government has civil service procedures in place, the courts generally leave federal organizations alone. Who is left are the employees of state and local governments.

An examination of the First and Fourteenth Amendment rights of employees within government organizations is profitable because it is an excellent philosophical laboratory in which to test our deepest feelings on the value and the danger of freedom of speech. In the closeness of the workplace, the damages seem more real. The issues seem sharper. It forces us to weigh our fears for organizational efficiency against our longing for free speech. In short, it forces us to put our tax money where our mouth is.

NOTES

1. 391 U.S. 563 (1968).

2. 391 U.S. 563, 568 (1968).

3. Geringer v. Center School District No. 58, 477 F.2d 1164 8th Cir. 1973).

4. Janetta v. Cole, 493 F.2d 1334 (4th Cir. 1974).

5. Fisher v. Walker, 465 F.2d 1147 (10th Cir 1972).

6. Roseman v. Indiana University of Pennsylvania, 520 F.2d 1364 (3rd Cir. 1975).

7. Ayers v. Western Line Consolidated School District, 555 F.2d 1309 (5th Cir. 1977).

8. 439 U.S. 410 (1979).

9. 439 U.S. 410, 417 (1979).

10. Compare Foster v. Ripley, 645 F.2d 1142 (D.C. Cir. 1981), where objections to a reorganization plan in the Smithsonian Science Information Exchange were found to be of personal concern and had little First Amendment weight, with Myers v. Connick. 654 F.2d 719 (5th Cir. 1981) where complaints by an assistant district attorney over her transfer to another section were found to be Constitutionally protected.

11. 391 U.S. 563, 569-70 (1968).

12. 391 U.S. 563, 570 (1968).

13. 439 U.S. 410, 416 (1979).

14. See: Long v. Board of Education of the City of St. Louis, 456, F.2d 1058 (8th Cir. 1972).

15. McConnel v. Anderson, 451 F.2d 193 (CA8 1971); Singer v. United States Civil Service Commission, 530 F.2d 247 (9th Cir. 1972); Van Ooteghem v. Gray, 654 F.2d 304 (5th Cir. 1981).

16. Santos v. Miami Region, U.S. Customs Service, 642 F.2d 21 (1st Cir. 1981).

17. Mt. Health Board of Education v. Doyle, 429 U.S. 274 (1977).

39. Wilson V. City of Littlejohn, Colorado, 732 F.2d 765 (10th Cir. 1984).

40. Jones v. State of Georgia, 726 F.2d 670 (11th Cir. 1984).

41. 103 S. Ct. 1684, 1692-3 (1983).

42. Id. at 1693, 1701-2.

43. Wells v. Hico Independent School District, 736 F.2d 243 (5th Cir. 1984).

44. O'Brien v. Town of Coledonia, 748 F.2d 403 (7th Cir. 1984).

45. Knapp v. Whitaker, 757 F.2d 827 (7th Cir. 1984).

46. Brockwell v. Norton, 732 F.2d 664 (8th Cir. 1984).

47. Anderson v. Central Point School District No. 6, 746 F.2d 505 (9th Cir. 1984).

48. Brown v. Dept. of Transportation, FAA, 735 F.2d 543, 545 (Fed. Cir. 1984).

49. Perry v. Bailey, 726 F.2d 670 (11th Cir. 1984).

50. 107 S. Ct. 2891 (1987).

51. 730 F.2d 444 (6th Cir. 1984), cert. denied, 105 S. Ct. 1373 (1985).

52. Id. at 1376.

53. 107 S. Ct. 2891, 2895 (1987).

54. Id. at 2897.

55. Id. at 2901.

56. Id. at 2903-4.

57. 825 F.2d 1127, 1131 (7th Cir. 1987).

58. 827 F.2d 270, 276 (8th Cir. 1987).

59. 107 S. Ct. 2891, 2898 (1987).

60. Id. at 2898, 2899.

61. Id. at 2898.

62. Id. at 2899.

63. Id. at 2900.

64. Id. at 2901.

65. Id. at 2901.

66. Id. at 2904.

67. Id. at 2904, 2905.

68. Id. at 2895.

69. 825 F.2d 1127, 1132 (7th Cir. 1987).